HAROLD B. WILLEY

Supreme Court of the United States

OCTOBER TERM, 1955

No. 453

WM. H. MULLER & CO., INC.,
Petitioner-Appellant Below,

versus

SWEDISH AMERICAN LINE LTD. and TRANSATLANTIC STEAMSHIP COMPANY, LTD.,
Respondent-Appellee Below.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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October, 1955.

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WM. H. MULLER & CO., INC.,
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SWEDISH AMERICAN LINE LTD. and TRANSATLANTIC STEAMSHIP COMPANY, LTD.,
Respondent-Appellee Below.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Petitioner seeks that a Writ of Certiorari issue to review the decree of the Court of Appeals for the Second Circuit affirming the decision and decree of the United States District Court for the Southern District of New York which ordered dismissal of the libel herein and, in support of its petition, respectfully shows:

I. Question Presented.

The important controversial question of law presented for determination in this case is:

> May an American citizen dealing in international commerce, who sues in his own right for loss of his cargo during transportation from a foreign to a United States port, be deprived of redress in our admiralty courts because the foreign steamship owner, in issuing his bill of lading, inserted therein

a clause requiring exclusive jurisdiction of disputes in the courts of a foreign country?

By holding the clause valid and enforceable because of its "reasonableness," the Court of Appeals refused to follow the law as enunciated in *Insurance Company* v. *Morse*[1] but accepted the dictum of Judge LEARNED HAND in *Krenger* v. *Pennsylvania Railroad Co.*[2]

The validity of unilateral provisions in bills of lading requiring suit in a foreign land is of urgent moment to the maritime industry and American importers of foreign goods. For the first time the importers now find themselves remediless under the decision of the court below, if their damages are not sufficiently large to support the expense of a referral of the cause to whichever foreign country the ocean carrier stipulates to be the forum of litigation.

In the determination of this question it now must be decided whether a citizen of the United States has an absolute right to invoke and maintain the jurisdiction in our courts over his asserted claim. When in 1950 this question was last before this court,[3] it was coupled with the application of the doctrine *forum non conveniens* and then this court said: "The doctrine is of long standing in admiralty, but this Court has not previously had to apply it to a suit brought by a United States citizen * * *. We need not now decide the abstract question whether United States admiralty courts may decline jurisdiction over libels brought by United States citizens."

Until the decision below, similar clauses had never been held valid although some district judges had considered the clause as an element in a decision based upon

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[1] 87 U. S. 445.

[2] 2 Cir. 174 F. (2) 556.

[3] *Swift & Co. Packers* v. *Compania Colombiana Del Caribe*, 339 U. S. 684, 697.

forum non conveniens.[4] Thus the decision below is the first to uphold the clause as valid and enforceable in and of itself even though such court admitted that its ruling was in conflict with *Insurance Company* v. *Morse* and a long line of decisions which hold such clauses to be null and void.[5] It is even more extraordinary that the court should arrive at such conclusion without discussing or ruling upon petitioner's contention that a United States citizen may not be relegated to a foreign country for the determination of his claim.

While this court in the *Swift* case considered the question abstract and declined to pass upon it, we believe it is now squarely before this court to pass upon the asserted absolute right of a citizen to redress before our courts.

Authoritative and definitive resolution of the question is of greatest moment to the entire maritime industry as well as the businesses engaged in international commerce affected thereby.

II. Jurisdiction and Opinions Below.

Jurisdiction of this cause in the court of first instance lies under 28 U. S. C. 1333.

Jurisdiction of this court lies under 28 U. S. C. 1254. The opinion of the District Court was rendered on August 17, 1954 and entered on August 24, 1954 and is unreported. The opinion of the Court of Appeals was rendered and entered on July 15, 1955 and is unreported.

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[4] E.g., *The Geisha,* 94 F. Supp. 60 (S. D. N. Y.), Aff'd 2 Cir., 187 F. (2) 990; *The Iquitos,* 286 Fed. 383 (W. D. Wash. 1921); *The Tricolor,* 2 Cir., 65 Fed. (2) 392.

[5] "It is true that there has been much difference of opinion over the validity of contractual provisions which purport to limit a jurisdiction which would otherwise attach. The law has long viewed such agreements askance. This can readily be seen by comparing § 558 of the Restatement of the Law of Contracts with § 617 of the Restatement of Conflicts of Law. For a general discussion of the older law see also Insurance Co. v. Morse, 87 U. S. 445; * * *". From opinion of the Court of Appeals in this case at page 55 of Record.

III. Statement of the Case.

Petitioner, a New York corporation, brought this action in admiralty to recover from the Swedish owners of the *M/V Oklahoma* the value of its cargo of cocoa beans which was lost when the vessel split in two and sank during a voyage from Gothenburg to east coast United States ports.

The shipper of this cargo as shown on the bill of lading was Fallenius & Lefflers A. B. of Gothenburg, Sweden. The consignee was "order of A. Johnson & Co. Inc., New York." Petitioner is the purchaser of the original negotiable bill of lading which bears the endorsement in blank of A. Johnson & Co. Inc. and thereby became entitled to delivery of the cargo.

By way of explanation it should be noted that in its most simple application a transaction in international or foreign commerce originates by the purchase of a commodity from a foreign seller, payment for which is to be made against sight draft at the buyer's bank. The seller thereupon assembles and packages the commodity, delivers it at seaport to the ocean carrier, receives in exchange a printed form bill of lading which, with his invoice, is mailed or presented to the consignee's bank. Thereupon title to the goods passes to the buyer although he does not view the bill of lading or ascertain its terms until long after the goods are already in transit.

Among the cargoes totally lost as a result of this occurrence were those of fifty-four (54) other United States citizens. Libels asserting the claims of such other cargo owners were similarly filed in admiralty before the District Court in New York. Such causes, by agreement among counsel, have been stipulated to abide the ultimate decision of this court in this cause.

Petitioner's cargo and those of all such other libelants were shipped by foreign shippers under identical bills of lading which contained the following clause:

> "JURISDICTION. Any claim against the carrier arising under this bill of lading shall be decided according to Swedish law, except as provided elsewhere herein, and in the Swedish courts, to the jurisdiction of which the carrier submits himself."

On motion the District Court dismissed the libel and referred petitioner to Sweden, holding that the clause constituted an agreement which should be given effect. The decision of such court was not based upon the doctrine *forum non conveniens* but on the grounds that there was no showing that petitioner cannot obtain justice in Sweden and that there is no problem of the statute of limitations nor of the applicability of the United States Carriage of Goods by Sea Act by the Swedish courts.

Affirming, the Court of Appeals held that despite the "older law" which "has long viewed such agreements askance" the clause is enforceable since it is "reasonable."

Its approach to the determination that the clause was "reasonable" was not on a basis of any expressed agreement or intentions of the foreign shipper and foreign carrier made coincident with the issuance of the bill of lading but upon the reasoning that because the *M/V Oklahoma* was Swedish owned and built and the members of her crew resided in Sweden, the clause was thereby reasonable and enforceable.

Such reasoning applies to a consideration of the question "*forum non conveniens*" not, we submit, to the construction of a clause in a bill of lading.

We cannot help but conclude from the decision of the Court of Appeals that such court, realizing that in the *Swift* case it was believed the question then to be abstract, knowingly passed on to this Court for ultimate decision, the question of a citizen's right to the maintenance of litigation in our courts.

Today, with the tremendous registration of both American and foreign controlled ocean vessels under the

Liberian, Panamanian and Central American country flags, a situation will soon result that American importers will be relegated to these and other foreign courts by the simple expedient of insertion in bills of lading of a unilateral clause requiring the litigation of disputes in foreign countries.

Definitive action must be taken by this court to guard against irreparable harm to the importers of this country.

IV. Reasons Relied on for Allowance of the Writ.

The Court of Appeals has decided an important question of federal law which has not been but should be settled by this Court.

By deciding that a United States citizen may be remitted to a foreign country for his legal redress in an admiralty cause, the Court of Appeals has closed, in that circuit, a question which was of sufficient moment to be singled out for comment by this court in *Swift & Company Packers* v. *Compania Colombiana Del Caribe, S. A.*, 339 U. S. 684, 70 S. Ct. 861, 1950 A. M. C. 1089. This court in such case left the question open but deliberately noted that it had never had to apply the doctrine of *forum non conveniens* to a suit brought by a United States citizen and that it had rarely been so applied by the lower courts.

Therefore, the predicament in which American importers presently find themselves undoubtedly stems from the absence of a definitive statement on the part of this court regarding the lack of or limited jurisdiction in lower courts in referring citizens to foreign countries.

To fill the gap left by the *Swift* case a trend has sprung up in the lower courts to qualify or restrict the established rule that clauses calling for exclusive jurisdiction in foreign countries are invalid where citizens are involved, by proclaiming that the judges have the inherent right to exercise discretion in determining whether to retain or

deny jurisdiction dependent upon the facts of the particular case. This trend was recognized by the Court of Appeals for the Fifth Circuit in the case of *Burt* v. *Isthmus Development Co.*[6] decided in 1955, which concerned an action for damages brought in Texas by a New York citizen against a corporation domiciled in Texas. Defendant moved to dismiss on the ground that the contract sued upon restricted the parties to suit in Mexico and on the further ground of *forum non conveniens.* The Court of Appeals found it unnecessary to pass on the contract provision but reversed the district court's dismissal of the suit on the ground of *forum non conveniens* citing *The Saudades*[7] and the *Swift* cases, and stating:[8] "It strikes us as being inconsistent with the very purpose and function of the federal courts to hold that one may decline to hear a case and thereby in effect to decree that a citizen must go to a foreign country to seek redress of an alleged wrong".

The court, for reasons otherwise stated in the opinion, chose not to pass upon the question of a citizen's absolute right to maintain his suit in our courts, commenting upon the fact that the Supreme Court, in the *Swift* case, had declined to pass upon that question. Accordingly the question again was left undecided.

The trend of broadening the discretionary powers of the District Court, until the decision in this case, thus had never extended so far as to refer a citizen, suing in his own right, to a foreign country for the litigation of his claim.[9]

In 1933, the Court of Appeals for the Second Circuit in the oft cited case of *The Tricolor*[10] did hold that a plea of inconvenience may prevail against an American under-

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[6] 5 Cir. 218 F. (2d) 353, cert. den. 349 U. S. 922, 75 S. Ct. 661.

[7] 67 F. Supp. 820.

[8] *Supra,* footnote 6, at page 357.

[9] This was recognized by the District Court in this case.

[10] 2 Cir. 65 F. (2d) 392.

writer as subrogee of a foreign cargo owner, but the rationale, in such case, was the well established rule that the rights of a subrogee can rise no higher than those of its subrogor, especially jurisdictional rights. LEARNED HAND, Ch. J., who wrote the opinion made it clear that the result would have been different if the citizen were suing in his own right.[11]

In *The Geisha*[12] in 1950 wherein the Second Circuit Court of Appeals affirmed the District Court's declination of jurisdiction, the libelant was considered merely the assignee of an alien, since the latter had title to the goods at the time of the loss, and the holding of that case is but a logical sequel to *The Tricolor* case.

Now it seems that the trend has reached the point where American citizens may be deprived of redress in our courts by the simple expedient of a foreign shipowner inserting in his bill of lading a provision requiring suit before the courts of his homeland. Should his vessel be foreign built and manned by a crew claiming foreign citizenship, it seems then to follow that, *ipso facto,* litigation will be restricted to the courts of such shipowner's choosing. Such cannot be the intendment of our courts.

It is singular to note that in deciding the District Court had discretion to decline jurisdiction and refer a United States citizen suing in his own right to a foreign country, the court below neither referred to nor gave heed to the "different" considerations[13] referred to by this court in

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[11] On pages 392-393, he wrote "But the libellant is a citizen and asserts its absolute privilege of resort to its own courts, independently of any convenience to the respondent. How far such inconvenience can be recognized, depends upon the local procedure which at times does indeed protect a nonresident from local suit. Courts are maintained to give redress primarily to their own citizens; it is enough if these conform to the conditions set upon their jurisdiction. *All this is entirely true, and would be conclusive, if the libellant sued in its own right.*" (Emphasis supplied.)

[12] 187 F. (2d) 990.

[13] "Application of *forum non conveniens* principles to a suit by a United States citizen against a foreign respondent brings into force considerations very different from those in suits between foreigners" (p. 697).

the *Swift* case. This court did not find it necessary to set forth what those considerations were, but it would not be presumptuous to suggest that its theory was not unlike that in the well reasoned opinion of KIRKPATRICK, D. J.,[14] wherein he denied a plea of *forum non conveniens* on the ground that "an American court may not refuse to try a case brought by an American citizen unless it feels that injustice would be done by allowing him to proceed in his own court".[15]

The Court of Appeals, in fact recognized the unsettled nature of the question[16] but chose to follow the dictum of LEARNED HAND, Ch. J., in the inapposite case of *Krenger* v. *Pennsylvania R. R. Co.*,[17] and apply it to this admiralty matter with full force and vigour. The application of the *Krenger* dictum however to the instant case serves only to confound the rights of United States importers further, since it is a far different course to send citizens to foreign countries, than to another United States District, more conveniently located to the parties. Corbin on Contracts emphatically supports this view.[18]

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[14] *The Saudades, supra,* footnote 7.

[15] (p. 821) "The result of such a rule is that the discretion of the Court, so far as it has any existence, is limited, and that mere inconvenience to the respondent, or to both parties, will not be considered a ground for exercising it to refuse jurisdiction."

[16] *Supra,* footnote 5.

[17] *Supra,* footnote 2. The *Krenger* case was an action for personal injuries under the Federal Employers Liability Act. Plaintiff and defendant agreed *after the injury* that plaintiff would not sue except in the state where the injuries were sustained or where the plaintiff was then living. Plaintiff sued in the Eastern District of New York in violation of the agreement. The District Court granted plaintiff's motion to strike from the answer the defense of improper venue and the Second Circuit Court of Appeals affirmed on the ground that the contract was illegal as an exemption of a liability granted by the Act. L. HAND, Ch. J., concurred in the result on the ground that the contract was against public policy. Specifically, he referred to the revulsion of the courts for such contracts and Congress' consideration that the employee bargains at a disadvantage in respect to venue. He stated the contract would have been valid if defendant proved it to be reasonable and based on fairness.

[18] In 6 Corbin on Contracts, § 1445, referred to by the Court of Appeals, that learned author states "Our courts are practically certain to disregard the limiting provision if it is one that would have the effect of requiring one of our own citizens to go to a foreign or distant land to obtain justice."

We further urge this court to recognize that,

The Court of Appeals below has decided a federal question in a way in conflict with applicable decisions of this Court.

This we submit is error. As early as 1874, in *Insurance Company* v. *Morse,* this court held that agreements in advance of a dispute, tending to oust the courts of the jurisdiction conferred in them by law, are illegal and void. In such case, the State of Wisconsin provided by statute that as a condition precedent to doing business in that State, all foreign corporations must agree not to remove any action to the federal courts. The insurance company did agree to this, but when sued upon its policy allegedly violated the agreement by removing a cause to the federal court. The Supreme Court of Wisconsin upheld the agreement, but this court thereupon reversed with no qualification that the agreement would have been valid, if reasonable.

The principle enunciated in the *Morse* case has been often cited and followed, and was specifically approved by this court in *Barron* v. *Burnside.*[19]

The *Morse* case was undoubtedly responsible for the long line of decisions, federal and state, holding such clauses, *per se,* null and void.[20] The decision of the Court

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[19] 121 U. S. 186, 7 S. Ct. 931, 30 L. Ed. 915 (1887).

[20] e.g., *Otto A. C. Hagen Corporation* v. *Steamship Edam, et al.,* 27 Fed. Supp. 8 (S. D. N. Y. 1938);
S. S. Joh Gorthon, 1949 A. M. C. 1198 (no official citation);
Prince Steam-Shipping Co. v. *Lehman,* 39 Fed. 704 (S. D. N. Y. 1889);
Slocum v. *Western Assurance Co.,* 42 F. 235 (S. D. N. Y. 1890);
The Etona, 64 F. 880 (S. D. N. Y. 1894); aff'd 71 F. 895;
Gough v. *Hamburg Amerikanische Paketfahrt Aktiengesellschaft,* 158 F. 174 (S. D. N. Y. 1907);
In re Application of Hamburg America Line, 135 Misc. 715, 238 N. Y. S. 331 (1930); aff'd 228 App. Div. 802, 239 N. Y. S. 914;
In re Andrus' Will, 156 Misc. 268, 281 N. Y. S. 831 (1935);
Parker v. *Kraus Co., Ltd.,* 157 Misc. 667, 284 N. Y. S. 478; aff'd 249 App. Div. 718, 292 N. Y. S. 955.

of Appeals recognizes the existence of the long line of authorities, including the *Morse* case, but considers that they no longer represent the public policy of the United States, but that the dictum of LEARNED HAND, Ch. J., in the *Krenger* case represents a view superior to that which is the basis of the *Morse* case.

V. Conclusion.

It is respectfully submitted that the foregoing considerations warrant allowance of the writ sought by petitioner.

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HILL, RIVKINS, MIDDLETON, LOUIS & WARBURTON,
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Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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November, 1955

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I. Questions Presented

Two questions are presented by the petition herein: (1) whether an American citizen who purchases a bill of lading is bound by a clause of that bill of lading, validly agreed upon by the Swedish shipper and Swedish shipowner, providing for the determination of any disputes in the courts of Sweden; and (2) whether the District Court abused its discretion in holding that there should be dismissed on the ground of *forum non conveniens* an action for loss of cargo on the high seas brought by an American holder of a bill of lading which contains a binding agreement made by the Swedish shipper and the Swedish shipowner for the determination of any disputes in the courts of Sweden and which provides for carriage of the goods from Sweden to the United States on a Swedish flag vessel, designed in Sweden, built in Sweden, classed in Sweden, maintained in Sweden, manned by a Swedish crew, under

circumstances where the vessel was lost at sea before even reaching an American port, where virtually all of the witnesses are Swedish, and where the substance of the action is that the vessel was not properly designed, constructed, maintained, repaired, and manned.

Petitioner incorrectly, we submit, alleges that in the determination of the foregoing questions, it must be decided whether a citizen of the United States has an absolute right to invoke and maintain the jurisdiction of American courts over his claim.

II. The Petition for Writ of Certiorari Should be Denied

1. *The case does not turn on whether an American citizen has an absolute right to maintain jurisdiction in American courts.*

Petitioner quite correctly points out that this Court expressly declined in *Swift & Co.* v. *Compania Caribe*[1] to pass upon the question of whether an American citizen has an absolute right to maintain jurisdiction in the courts of the United States. However, we submit that this question *is not now* before this Court and its determination *was and is not necessary* to sustain the decisions of the courts below.

Petitioner urges, at page 9 of the petition, that "an American court may not refuse to try a case brought by an American citizen *unless it feels that injustice would be done by allowing him to proceed in his own court*".[2] (Em-

[1] 339 U. S. 684.

[2] In the case of *Burt* v. *Isthmus Development Company*, 218 F. 2d 353, the Court of Appeals for the Fifth Circuit, following the statement quoted at page 7 of the petition, and after *refusing* to hold that no discretion exists to decline jurisdiction of a suit brought by an American citizen, stated:

> "We do, however, express the view that courts should require positive evidence of unusually extreme circumstances, and should be thoroughly convinced that material injustice is manifest before exercising any such discretion to deny a citizen access to the courts of this country" (218 F. 2d, at page 357).

phasis supplied.) Petitioner thus admits that there is *no absolute right* of an American citizen to maintain suit in American courts.

The District Court below found *as a fact* that injustice would "surely result" if libelant were permitted to maintain the present libel and held that the agreement between the parties to the bill of lading for exclusive jurisdiction in Sweden should be given effect and also that the libel should be dismissed on the ground of *forum non conveniens*.[3]

We submit that the foregoing *determination of fact and exercise of discretion* is not an appropriate question for review by this Court on writ of certiorari.

2. *The decisions below are not in conflict with any decision of this Court.*

Petitioner urges that the 1874 decision of this Court in the non-maritime case of *Insurance Company* v. *Morse*,[4] involving a state statute requiring foreign corporations, as a condition to doing business in the state, to agree not to seek removal to the Federal courts of cases brought against them in the state courts, is controlling in the present case.

We submit that the *Insurance Company* v. *Morse* decision is neither controlling nor applicable by analogy to an Admiralty case. Its statements as to public policy were based upon a line of early common law cases holding that executory arbitration agreements were void. Subsequent to the *Insurance Company* v. *Morse* case, this Court has held that even before the enactment of the arbitration statutes by the various states and by Congress, arbitration agreements in *Admiralty contracts* were valid.[5]

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[3] Opinion of District Court, Appendix to Appellant's Brief before the Court of Appeals, page 16.

[4] 87 U. S. (20 Wallace) 445.

[5] *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U. S. 109; *Marine Transit Corp.* v. *Dreyfus*, 284 U. S. 263.

3. *The central issue of this case is not whether the contract was valid, but is one of contract interpretation.*

Despite petitioner's contention, the issue in this case is *not* whether a contractual provision for exclusive jurisdiction in a foreign tribunal is valid.

Such a jurisdiction provision is valid in Sweden where the contract was made, and it is enforceable against the original parties to the contract, and against American citizens subrogated to their rights, in Sweden *and in our courts.*[6]

Thus the issue in this case is not whether an American citizen can contract to "oust" an American court of jurisdiction, but whether a contractual provision enforceable against the original parties to such contract is no longer enforceable, and the shipowner thereby deprived of one of its contractual rights, because an American citizen has by purchase acquired rights under that contract, notwithstanding that he purchased the bill of lading *subject to all the provisions thereof.*[7]

The courts below, two of the most experienced Admiralty courts in this country, have determined this question of contract interpretation contrary to the contentions made by the petitioner below.

There is *no suggestion* in the opinion of the Court of Appeals that it did not consider itself competent to decide this

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[6] *The Belgenland*, 114 U. S. 355, 363; *Mittenthal* v. *Mascagni*, 183 Mass. 19; *The Iquitos*, 286 Fed. 383; *United States M. & S. Ins. Co.* v. *A/S den Norske A. og A. Line* (*The Tricolor*), 1 F. Supp. 934, 65 F. 2d 392; *Cerro de Pasco Copper Corp.* v. *Knut Knutsen O.A.S.* (*The Geisha*), 94 F. Supp. 60, 187 F. 2d 990; *Cerro de Pasco Copper Corp.* v. *The Alabama*, 109 F. Supp. 856; *Atlantic Mutual Ins. Co.* v. *Nederland*, 1955 A. M. C. 620 (not officially reported); *Murillo Ltda.* v. *The Bio Bio*, 127 F. Supp. 13.

[7] *Givaudan Delawanna* v. *The Blijdendijk*, 91 F. Supp. 663, 666; *Mowinckel* v. *Dewar*, 173 Fed 544, 548, modified on other grounds and affirmed 179 Fed 355, cert. den. 218 U. S. 676; *American Steel Co.* v. *Transmarine Corp.*, 36 F. 2d 246, 248.

case and knowingly passed it on to this Court, as petitioner contends at page 5 of the petition.

We submit that this question is not one which requires determination by this Court or which involves any conflict between the Circuits or with past decisions of this Court.

4. *Because the decisions below turned on the reasonableness, under the facts of this particular case, of contractual provisions, the case is not one of general interest.*

Petitioner urges that the question presented here is an important question of federal law which has not been but should be settled by this Court.

The question presented is, we submit, whether it is reasonable to enforce a valid jurisdiction clause against an American purchaser of a bill of lading to which the original parties were a Swedish shipowner and a Swedish shipper and which provides for a shipment from Sweden to the United States on a Swedish flag vessel manned by a Swedish crew and designed, constructed, classed, and maintained in Sweden, under circumstances where the holder of the bill of lading claims that the construction and maintenance of the vessel rendered her unseaworthy and caused her total loss on the high seas before the vessel had even reached a United States port.

The Circuit Court, while holding that the parties to a contract cannot by agreement oust a court of jurisdiction otherwise obtaining, also held that "if in the proper exercise of its jurisdiction, by a preliminary ruling the court finds that the agreement is not unreasonable in the setting of the particular case, it may properly decline jurisdiction and relegate a litigant to the forum to which he assented." [8]

Both courts below have found *as a fact* that under all the circumstances present in this case it is *reasonable* to enforce against petitioner the contractual clause agreed

[8] 224 F. 2d 806, at page 808.

upon by and enforceable between the original parties to the bill of lading from which petitioner's rights are derived.

The decisions below do not, therefore, present a situation, as claimed in the Petition at pages 6 and 8, where American importers will be relegated to foreign courts by the insertion in bills of lading by foreign shipowners of "unilateral" clauses requiring the litigation of disputes in foreign countries. The question is essentially the factual one of *reasonableness,* and under the decisions of the courts below the determination of whether to enforce such a jurisdiction clause will depend strictly upon the particular facts of the case before the court.

The decisions below decide only that when a bill of lading containing a jurisdiction clause valid and enforceable between the original parties thereto is purchased by an American citizen, an American court in which a libel has been filed *in disregard of the contractual provision* has discretion to determine whether an injustice would be done by permitting the American holder of the bill of lading to disregard the jurisdiction clause validly agreed upon between the original parties to the contract, and to determine whether under all the circumstances present in the case it would be reasonable to enforce the clause against the holder of the bill of lading and to decline jurisdiction because of this clause and also on the ground of *forum non conveniens.*

Petitioner fails to suggest any way in which it would be prejudiced by having this litigation in Sweden other than the unsupported reference at page 2 of the petition to "the expense of a referral of the cause" to Sweden. In view of the vital factual issue in this case of the seaworthiness of a Swedish-owned and operated vessel designed, built, and maintained in Sweden and manned by a Swedish crew, we submit that the expenses of both petitioner and respondents would be *considerably less* in Sweden.

In the *Swift* case, this Court stated:[9]

> "But, in any event, it was improper *under the circumstances here shown* to remit a United States citizen to the courts of a foreign country without assuring the citizen that respondents would appear in those courts and that security would be given equal to what had been obtained by attachment in the District Court." (Emphasis supplied.)

The Court emphasized that the District Court *did* have power to give to the libelant assurances that the respondents would appear in the foreign courts with security equal to that obtained in the District Court. This statement shows, we submit, that this Court found the lower courts in error not because a United States citizen had been remitted to foreign jurisdiction, but because the United States citizen had been remitted to a foreign jurisdiction without assurances that the respondent would appear there and give appropriate security.

In the present case, *neither of these two factors is present.* The carrier has expressly agreed to submit itself to the jurisdiction of the Swedish courts (bill of lading clause 2, quoted at page 5 of the petition) and respondents have deposited with the Swedish court a letter providing irrevocably that the time for suit on all claims arising out of the loss of the Oklahoma shall be extended until six months after final determination by this Court with respect to the petition herein.[10]

In the present suit petitioner has not attached any other vessel or property of respondents, and no security has been given. Since the carrier is a Swedish corporation and owns a very large number of vessels, it is evident that the petitioner herein will be amply secured in Sweden and, if petitioner wishes, can obtain specific security.

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[9] 339 U. S., at pages 697-8.

[10] An officially certified copy of this letter is printed at pages 5-7 of the Appendix to Appellees' Brief before the Court of Appeals.

Accordingly, there is no possibility whatsoever that the petitioner herein does not have complete assurances as to the appearance of the carrier in the Swedish court and as to security in a Swedish suit.

The decisions of the District Court and of the Court of Appeals in this suit very clearly limit the holding of this case to the *particular factual circumstances* present.

We submit that this narrow question is not one important enough to the general public, as distinguished from the litigants concerned in this case, to require that such narrow question be settled by this Court; and that the decisions below do not raise any important question of Federal law which should be settled by this Court.

III. Conclusion

It is respectfully submitted that the foregoing considerations require denial of the petition for writ of certiorari in this case.

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RICHARD G. ASHWORTH,
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November, 1955

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HAROLD B. WILLEY, CLERK

Supreme Court of the United States

OCTOBER TERM, 1955

No. 453

WM. H. MULLER & CO., INC.,
Petitioner-Appellant Below,

versus

SWEDISH AMERICAN LINE LTD. and TRANSATLANTIC STEAMSHIP COMPANY, LTD.,
Respondent-Appelle Below.

PETITIONER'S REPLY BRIEF IN SUPPORT OF ITS PETITION FOR WRIT OF CERTIORARI

GEORGE B. WARBURTON,
Proctor for Petitioner.

HILL, RIVKINS, MIDDLETON, LOUIS & WARBURTON,
DAVID L. MALOOF,
JOSEPH T. MCGOWAN,
of Counsel.

November, 1955.

Bowne & Co., Inc., 163 Front Street, New York 38

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PETITIONER'S REPLY BRIEF IN SUPPORT OF ITS PETITION FOR WRIT OF CERTIORARI

Statement.

After the petition herein was filed the decision of the Court of Appeals was officially reported at 224 Fed. 2d 806.

This brief will serve to reply to matters asserted in respondent's brief and further to call to the attention of this Court a decision in point which has been decided since the filing of the petition herein.

POINT I.

The District Court did not hold that the libel should be dismissed on the ground of *forum non conveniens* nor did our appeal before the Court of Appeals or the petition for a writ of certiorari accuse the District Court of an abuse of discretion.

Respondent argues that the petition for a writ presents two questions of which the second is (p. 1):

> "(2) Whether the District Court abused its discretion in holding that there should be dismissed on the ground of *forum non conveniens* an action for loss of cargo * * *."

Again at page 3 it is asserted that "the District Court below found * * * that the libel should be dismissed on ground of *forum non conveniens.*"

Accordingly respondent argues that the determination of fact and exercise of discretion on the part of the District Court is not an appropriate question for review by this Court on writ of certiorari (p. 3).

We submit no such issue was raised by the petitioner. The District Court did not exercise its discretion in declining jurisdiction on the ground of *forum non conveniens.* In fact, such court never reached that question but rested its decision on the point that the bill of lading provision was binding as a contractual obligation and therefore enforceable. It touched upon the question *forum non conveniens* only in the following language:

> "Were I to reach the question of forum non conveniens, I would hold to the same conclusion in view of the agreement plus the facts that the *Oklahoma* is Swedish owned, was built in Sweden and all the crew members reside there."

This we submit, is a far cry from holding that dismissal of the libel by the District Court was on the basis of an exercise of discretion in applying the doctrine of *forum non conveniens.*

POINT II.

By applying the test of reasonableness to the validity of a jurisdictional clause, the court below has confused the rights of American citizens dealing in international commerce.

The court below considered that it was reasonable to enforce a unilateral clause because the *Oklahoma* was Swedish owned, etc.

In the recent case of *S. S. Punta Del Este,* as yet unreported, which was decided by FORMAN, C. J. in the Federal

Court for the District of New Jersey* a similar clause requiring suit in Uruguay was presented in an action between foreign nationals both alien to the United States. Judge FORMAN commented:

> "Although such contracts cannot bind a court, a recent decision in the United States Court of Appeals for the Second Circuit has held that they may be enforced, where it is reasonable to do so."

citing the instant case. Nevertheless Judge FORMAN refused to decline jurisdiction and send the parties to Uruguay even though neither was a citizen of the United States of America. His consideration of the case was based upon the reluctance of our courts to send litigants to a non-neutral forum for the settlement of their disputes. He said:

> "No case has been cited in which discretion has been exercised to send the parties to a non-neutral forum unless there was found an express agreement to submit to the laws of a particular country and to litigate only in its courts."

Thereupon he found that since it would serve no greater inconvenience to bring the ship's witnesses to New Jersey than to send libelant's clerks to Montevideo, there is no "balance strongly in favor of defendant which would move the court to exercise discretion in defendant's behalf."

Where then are cargo libelants left by these conflicting decisions? The Second Circuit chose to separate a clause of the contract requiring suit in Sweden with Swedish law to govern and enforce only the forepart of the clause, i.e., suit in Sweden. It declined to enforce the applicability of Swedish law in part because the Carriage of Goods by Sea Act provides that only the United States of America law shall be applicable when the goods move to or from United States ports in foreign commerce and in part because respondent, realizing our courts would not enforce Swedish

* Decision in full reported as Appendix.

law, included within the four corners of the bill of lading a modifying clause permitting the Swedish courts to apply United States of America law.

Must a cargo owner in each case first determine whether the foreign court will apply our laws? What would be the outcome if the foreign court chose to refuse to apply the Carriage of Goods by Sea Act in preference to its own laws? These imponderables will be presented in every case unless this Court acts definitively to uphold the retention of jurisdiction when sought by a United States citizen suing in his own right.

The respondent's suggestion that the decision herein is applicable to the facts in this case *only* and thus is not reviewable by this Court is contradicted by the admission that the right of an American citizen to maintain jurisdiction in United States courts has never before been passed upon by this court. If this writ of certiorari be denied the result will be to leave this question in its present confused and vague state and to subject the lower courts and litigants to an interminable number of interlocutory proceedings to determine reasonableness.

POINT III.

The lower court should have held the clause invalid, per se, as contrary to the public policy of the United States.

It is the public policy of the United States, as established in *Insurance Company* v. *Morse* and many other cases* that jurisdictional clauses are null and void, *per se,* without regard to the circumstances of the case. This policy is clearly defined in the case where a United States citizen is faced with such a clause by the indisputable fact that a citizen, suing in his own right, has never before been relegated to a foreign forum for redress (except seamen covered by a treaty).

* Cited by petitioner at page 10 of the petition.

The policy is in no sense fanciful or doubtful, but rests upon a sound realization of the fact that a United States citizen supports the federal courts and is entitled to maintain his action in those courts. This was recognized by Mr. Justice HOLMES in *Douglas* v. *New Haven R. Co.*, 179 U. S. 377, 387:

> "There are manifest reasons for preferring residents in access to often overcrowded courts, both in convenience and in the fact that broadly speaking it is they who pay for maintaining the courts concerned."

It has always been understood by the courts that clauses which *tend* to wholly oust a proper court of jurisdiction also tend to increase or diminish the statutory judicial power and impede the regular administration of justice, all in violation of public policy. *Insurance Company* v. *Morse*, 87 U. S. 445, 453; *U. S. Asphalt Refining Co.* v. *Trinidad Petroleum Co.*, 222 Fed. 1006.

The petitioner strongly urges, as it did in the courts below, that the requirement of bringing its suit in a foreign country is a diminution of the rights flowing to cargo owners under the Carriage of Goods by Sea Act. The cost to which a damaged cargo owner is to be put in litigating his claim abroad is an unwarranted restriction of his rights and furthermore is against our public policy. The analysis of this argument was strongly noted in the case of *United States* v. *Farr Sugar Corp., et al.*,* affirmed

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*191 Fed. 2d 370, 374:

"* * * The shipowners stress the consensual nature of the clause, arguing that a bill of lading is but a contract. But that is so at most in name only; the clause, as we are told, is now in practically all bills of lading issued by steamship companies doing business to and from the United States. Obviously the individual shipper has no opportunity to repudiate the document agreed upon by the trade, even if he has actually examined it and all of its twenty-eight lengthy paragraphs, of which this clause is No. 9. This lack of equality of bargaining power has long been recognized in our law; and stipulations for unreasonable exemption of the carrier have not been allowed to stand. Liverpool & G. W. Steam Co. v. Phenix Ins. Co., 129 U. S. 397, 441, 9 S. Ct. 469, 32 L. Ed. 788; Inman v. South Carolina R. Co., 129 U. S. 128, 139, 9 S. Ct. 249, 32 L. Ed. 612; Sante Fe, P. & P. R. Co. v. Grant Bros. Const. Co., 228 U. S. 177, 184, 185; 33 S. Ct. 474, 57 L. Ed. 787. Hence so definite a relinquishment of what the law gives the cargo as is found here can hardly be found reasonable without direct authorization of law. * * *"

by this Court, 343 U. S. 236, wherein CLARK, C. J., speaking for the Court of Appeals, Second Circuit, refused to uphold the so called "Both-to-Blame" collision clause.

POINT IV.

Respondents do not dispute facts which compel this court to review the decision below.

Nowhere in the reply brief does the respondent dispute petitioner's contention that the main reliance of the Court of Appeals upon *Krenger* v. *Pennsylvania Railroad Co.* is indefensible. The court below in attempting to justify its refusal to follow the *Morse* case quoted from dictum of L. HAND, Ch. J. in a case which related merely to an agreement to sue only in one of two federal districts in the United States. No regard was given to the vast difference between those facts and sending a United States citizen to Sweden for justice.

Respondent agrees that the question before the Court is whether an American citizen is bound by the jurisdictional clause found in a foreign bill of lading. It does not dispute the fact that this is the first decision ever to hold that an American citizen, suing in his own right, is so bound and thus obligated to sue in a foreign, non neutral forum (with exception of a seaman covered by a treaty). Respondent's contention, therefore, that this is not a question important to the general public would seem to be foreclosed from its own brief. Such a radical departure from public policy as represented by judicial precedents is most important to the entire maritime industry, including businesses engaged in or affected by international commerce.

Respondent's contention that the *Morse* case is not controlling nor applicable is in conflict with the lower court's own language. Judge HINCKS, referring to juris-

dictional clauses, observed that "The law has long viewed such agreements askance" and referred to the *Morse* case among other authorities.

This is not an action where the petitioner has become subrogated to or is the assignee of an alien, which are the facts of the cases relied upon by respondent. On the contrary, the petitioner was the actual owner of the cargo at the time of the loss.

CONCLUSION.

It is respectfully submitted that the foregoing considerations warrant allowance of the writ sought by petitioner.

GEORGE B. WARBURTON,
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HILL, RIVKINS, MIDDLETON, LOUIS & WARBURTON,
DAVID L. MALOOF,
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of Counsel.

November, 1955.

APPENDIX.

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

SOCIEDADE BRASILEIRA DE INTERCAMBIO COMERCIAL E INDUSTRIAL, LTDA., *Libelant,* vs. S. S. PUNTA DEL ESTE, her engines, boilers, etc., and ADMINISTRACION NACIONAL DE PUERTOS, *Respondents.*	Civil Action 239–55 in Admiralty On Motion to Decline Jurisdiction OPINION

APPEARANCES:

SMITH, STRATTON & WISE, by Hugh D. Wise, Jr., Proctors of Respondents, Gordon W. Paulson, of Counsel.

RICHMAN & BERRY, Proctors for Libelant, HILL, RIVKINS, MIDDLETON, LOUIS & WARBURTON, by J. Edwin Carey, of Counsel.

FORMAN, C. J.:

On August 10, 1953 the S. S. Punta Del Este left New Orleans carrying 80,000 bags of wheat flour shipped under bills of lading issued by Leo Zeitlin & Co., Inc. of New York and which were consigned to the libelant, a corporation of Brazil. It is alleged that the flour arrived at its destination, Santos, Brazil, in damaged condition. Libelant attached the Punta Del Este while she was at dock within this jurisdiction and later consented to her release after filing of security by respondents.

The Punta Del Este is owned by the Administracion Nacional De Puertos, an agency of the Uruguayan govern-

ment. The Administracion chartered the Punta Del Este to Montemar, S.A., a Uruguayan corporation, which, in turn, chartered her to Leo Zeitlin & Co. of New York.

The respondents have now moved this court to decline to exercise the jurisdiction it concededly has over this cause on the ground that the suit is one between aliens and can be more conveniently tried elsewhere. The parties agree that the issue is solely one for this court's discretion. See 1 Benedict on Admiralty § 84.

Respondents attempt to show that libelant has bound itself by contract to litigate its claim only in Uruguay and under the law of that country. Although such contracts cannot bind a court, a recent decision of the United States Court of Appeals for the Second Circuit has held that they may be enforced, where it is reasonable to do so. Wm. H. Muller & Co. v. Swedish American Line, 224 F. 2d 806 (2nd Cir. 1955).

The affidavit submitted by respondents' counsel states that in their charter agreement the Administracion and Montemar, S.A. agreed to submit their disputes to the laws and courts of Uruguay. It has not been demonstrated that this charter agreement between the Administracion and Montemar, S.A. has been made applicable to the libelant.

The bill of lading of Leo Zeitlin & Co. provides: "all terms, conditions and exceptions as of charter party dated July 17, 1953 to be considered as fully incorporated". This has reference to the charter party between Montemar, S.A. and Zeitlin, which has not been placed before this court. But, assuming that it has a provision whereby Zeitlin and Montemar, S.A. agreed that Uruguayan law was to apply, that provision could not be imposed upon the libelant for the bill of lading issued by Zeitlin to libelant further provides:

> "This shipment shall have effect subject to the provisions of the Carriage of Goods by Sea Act of

> the United States (46 U. S. C. § 1300, et seq.), approved April 16, 1936, which shall be deemed to be incorporated herein and nothing herein contained shall be deemed a surrender by the carrier of any of its rights or immunities or an increase of any of its responsibilities or liabilities under said Act."

Thus, any condition in the Zeitlin-Montemar charter party that the parties to whom it applies are to litigate only under Uruguayan law would be modified by this express imposition of the Carriage of Goods by Sea Act contained in the Zeitlin bill of lading.

The Zeitlin bill of lading also contains a clause that

> ". . . the rights and obligations . . . of each and every person . . . in respect of the receipt, care, custody, carriage, delivery or transshipment of the goods . . . shall be subject to and governed by the terms of the carrier's regular bill of lading, which shall be deemed to be incorporated herein. . . ."

A copy of the regular bill of lading of the Administracion does carry a provision that all claims "if made judicially . . . must be heard before the competent Court in the City of Montevideo." This is by no means inconsistent with the provision that American law is to apply, and is an agreement that certainly is not binding on the court, and even under the decisions cited by respondents is not to be enforced where that would be an "unreasonable" course. Wm. H. Muller & Co. v. Swedish American Line, supra.

The respondents rely on the following cases: Wm. H. Muller & Co. v. Swedish American Line, supra; Cerro de Pasco Copper Corp. v. Knut Knutsen, 187 F. 2d 990 (2nd Cir. 1951); United States M. & S. Ins. Co. v. A/S Den Norske A. Og. A. Line, 65 F. 2d 392 (2nd Cir. 1933) and The Iquitos, 286 F. 383 (W. D. Wash. 1921). In each there were specific provisions requiring the parties to litigate in and under the law of a particular forum. They are

distinguishable because here the agreements impose no such identity of both governing law and situs of litigation which can be said to bind the libelant.

Some features of the case of Galban Lobo Trading Co. S/A v. The Diponegoro, 108 F. Supp. 741 (S. D. N. Y. 1952), relied on by the respondents, are similar to this one. That was a suit by a Cuban corporation against an Indonesian corporation for damage to a cargo of sugar. The cargo was shipped from Havana and only part was delivered to its destination in Israel. The remainder, for some unexplained reason, had been discharged in Marseille. Despite the fact that the contract of carriage had been executed in New York and incorporated the provisions of the Carriage of Goods by Sea Act, the court declined jurisdiction, leaving the parties to the French courts. It was found that a court in Marseille would be a more convenient forum because of the easier availability there of sources of proof. But, it is to be noted that in the Galban Lobo case the parties were remitted from one neutral forum to another. In this case the effect of declining jurisdiction would be to force libelant to sue in respondents' home forum. In The Harfry, 39 F. Supp. 893 (D. N. J. 1941), the lack of another available neutral forum was held to have significant weight in a decision to retain jurisdiction over an admiralty action between aliens. No case has been cited in which discretion has been exercised to send the parties to a non-neutral forum unless there was found an express agreement to submit to the laws of a particular country and to litigate only in its courts. See also Bernhard v. Greene, Fed. Case No. 1,349 (D. Ore. 1874); The Belgenland, 114 U. S. 355, 368-369 (1885).

As to the availability of proof, respondents urge as a reason for granting the motion to decline jurisdiction that the testimony of tally clerks at Santos, as well as that of the crew of the Punta Del Este, will be needed. Respondents also point out that the ship's officer who was in charge

of unloading the cargo is no longer on board the Punta Del Este and that his testimony, too, will have to be brought here from Santos, since he is presently engaged in shore duty there. However, libelant has asserted without contradiction that the Punta Del Este has been in North American waters for the past several months and therefore the testimony of her crew has been readily available.

Respondents also support their argument by agreeing to transfer the security they have deposited in this court to Uruguay and to waive any defense they may have under a statute of limitations. Thus, they assert, libelant will not suffer "hardship" by a dismissal of the libel. That is not the point. What are to be applied in this case are the criteria included in the doctrine of forum non conveniens (as distinguished from those applied under the transfer provisions of 28 U. S. C. § 1404(a); see Norwood v. Kirkpatrick, 349 U. S. 29 (155)). Under that doctrine the important right of the plaintiff or libelant to choose as he pleases from among the possible sites of litigation is respected unless the defendant or respondent can show that he will be "unfairly prejudiced", Kloeckner Reederei und Kohlenhandel v. A/S Hakedal, 210 F. 2d 754, 756 (2nd Cir. 1954), or it is found that "the balance is strongly in favor of the defendant", Gulf Oil Corp. v. Gilbert, 330 U. S. 501, 508 (1947). And since it will be no greater inconvenience for the respondents to bring to this court testimony of persons in Santos than it would be for libelant to take that of clerks in New Orleans to Montevideo, there is no "balance strongly in favor of the defendant" which would move the court to exercise its discretion in respondents' behalf.

Therefore, the motion to decline jurisdiction will be denied and an order should be settled accordingly.